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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 85.

CITIES SERVICE GAS COMPANY, a Corporation,
Appellant,

vs.

STATE CORPORATION COMMISSION OF KANSAS, MARION BEATTY, Chairman, RICHARD C. BYRD and HARRY G. WILES, As Members of Said Commission, and Their Respective Successors in Office,
Appellees.

PETITION FOR REHEARING.

CLYDE MILLIGAN, General Counsel,
State Corporation Commission of Kansas,
State Office Building,
Topeka, Kansas,

FRANK G. THEIS, Special Counsel,
301 A. C. Office Building,
Arkansas City, Kansas,

WAYNE COULSON, Counsel,

*DALE M. STUCKY, Counsel,
901 First National Bank Building,
Wichita, Kansas,

Attorneys for Appellees.

*Attorney upon whom service should be made.

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Appellees.

PETITION FOR REHEARING.

Come now appellees, State Corporation Commission of Kansas, Marion Beatty, Chairman, Richard C. Byrd and Harry G. Wiles, as members of said Commission, and their respective successors in office, and hereby petition the court for a rehearing herein of its *per curiam* judgment and decision entered on the 20th day of January, 1958,[1] on grounds set out below.

Inherent in the reversal in this case is a limitation upon the power of a state to enter an order concededly

[1] "*PER CURIAM*: The judgment is reversed. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672; *Natural Gas Pipeline Co. v. Panoma Corporation*, 349 U.S. 44."

necessary and required in the interest of conservation, prevention of waste and protection of correlative rights in a natural gas reservoir.[2] The reversal makes that one thing plain. But the one sentence *per curiam* decision affords no basis upon which it can be determined just what provision of the Natural Gas Act is now held by this court to have cut down, handicapped, diluted and usurped the power and authority which the states had in 1938. Nor does such one sentence *per curiam* decision afford any clue as to the extent to which state power to conserve gas and protect correlative rights in a natural gas reservoir is now limited.

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[2]The Court's suggestion, at oral argument, that counsel for appellees refrain from arguing that the evidence and findings of the Commission demonstrated the reasonableness and necessity for the order as a measure to conserve gas, prevent waste and protect correlative rights is consistent only with the view that this was conceded in the case notwithstanding appellees' contention, first made here in oral argument, that it was "not conceding the necessity of the order" and notwithstanding the assertion of the Solicitor General, in oral argument on behalf of the Federal Power Commission, that the federal commission had "no intention to interfere with *proper* measures of conservation." The position that the order was not necessary or required in the interest of conservation, prevention of waste or protection of correlative rights was, indeed, taken by appellant in its protest before the state commission (R. 35-39), in its motion for rehearing before that body (R. 51-66) and its petition for judicial review (R. 68-75), but was explicitly abandoned on judicial review before the Supreme Court of Kansas, as is shown by the following portion of that Court's opinion:

> "Finally it can be stated that, inasmuch as appellants *have abandoned all questions involved in the court below except the jurisdictional one heretofore mentioned*, we must and do assume, the evidence before the Commission was sufficient to sustain its findings to the effect the involved order, upheld and sustained by the trial court, was necessary and required in the interest of conservation and prevention of waste of gas in the Hugoton Field." (R. 98, 180 Kan. 460-461, 304 P. 2d 533, emphasis supplied.)

The jurisdictional statement filed by appellant herein, presented only the question (p. 4) as to the authority of the state to enter such a conservation order, otherwise assumed valid, in the face of the provisions of the Natural Gas Act.

We respectfully submit that an examination of the two cases cited by the Court in support of the decision, being readily distinguishable on the facts and issues presented,[3] will be of little assistance to the many state legislatures, state regulatory agencies, and state attorneys general responsible for future state action in these areas. Nor, we submit, will such examination afford adequate guidance

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[3]Neither *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 190, nor *Natural Gas Pipeline Co. of America* v. *Panoma Corporation*, 349 U.S. 44, on which the reversal is based, considered or discussed the pre-1938 cases involving state action such as involved herein. These cases are *Ohio Oil Co.* v. *Indiana*, (1900) 177 U.S. 190; *Lindsley* v. *Natural Carbonic Gas Co.*, (1911) 220 U.S. 61; *Walls* v. *Midland Carbon Co.*, (1920) 254 U.S. 300; *Bandini Petroleum Co.* v. *Superior Court*, (1931) 284 U.S. 8; *Champlin Refining Co.* v. *Corporation Commission*, (1932) 286 U.S. 210; *Henderson* v. *Thompson*, (1937) 300 U.S. 258; *Thompson* v. *Consolidated Gas Utilities Corp.*, (1936) 300 U.S. 55; *Lacoste* v. *Department of Conservation*, (1923) 263 U.S. 545; *Bayside Fish Flour Co.* v. *Gentry*, (1935) 297 U.S. 422. Nor do either of them discuss the pre-1938 tax cases which were, prior to 1938, used by this court as a test of state regulatory action in this field, *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, at 235. Among these tax cases are *Hope Natural Gas Co.* v. *Hall*, (1927) 274 U.S. 284; *Oliver Iron Mining Co.* v. *Lord*, (1922) 262 U.S. 172; *Heisler* v. *Thomas Colliery Co.*, (1922) 260 U.S. 245; and *Utah Power & Light Co.* v. *Pfost*, (1932) 286 U.S. 165.

An examination of these pre-1938 decisions reveals that *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U.S. 190, were not cases loosening the constitutional restrictions on state activities affecting interstate commerce in the absence of federal regulation, but were consistent with pre-1938 decisions. Indeed, appellant and the Federal Power Commission never in the case at bar furnished this court with a single pre-1938 decision which even remotely suggests that Kansas could not have entered the order in question prior to the enactment of the Natural Gas Act in 1938. In *Phillips* and *Panoma*, relied upon here by the court, main reliance was placed by the losing parties upon *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.* and *Phillips Petroleum Co.* v. *Oklahoma*, both *supra*, without a showing by these losing parties that these two cases would have been decided the same way they were decided had they arisen prior to 1938. In the case at bar, appellees relied on the court's insistence in previous decisions that pre-1938 cases controlled. Thus the court here had before it for the first time a clear-cut issue as to what the pre-1938 situation was, which cannot be resolved by reference to two cases not discussing that issue.

to state or federal courts in the determination of other cases in this important field. Nor will Congress itself be adequately informed of the extent to which new legislation is now required by it to protect correlative rights, prevent waste and conserve gas.

There was nothing in the two cases cited in support of the Court's decision which necessarily or by implication detracted from or impaired the force of the language of *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 690, wherein it was stated:

> "* * * Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. Thus, *where sales, though technically consummated in interstate commerce, are made during the course of production and gathering* and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdition of the Federal Power Commission does not attach. * * *" (Emphasis supplied).

The above quoted language is impaired now for the *first* time by the *bare result* in this case and this is done without the articulation of any new basis for rational thought to substitute therefor.

Unless the result in this case be construed also as inviting a departure from *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, there is inherent in the decision the creation of a new no-man's-land in regulation. To the extent that the states are deprived of the use of the tool of minimum value attribution or minimum price regulation in the areas of conservation and protection of

correlative rights in natural gas reservoirs, that valuable tool has been lost to our economy until further federal legislation again closes the gap created by the decision in this case coupled with that of the *Hope* case above mentioned.[4]

On the other hand, assuming that the court in this case contemplates a departure from *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, neither state nor federal authorities are now able to determine to what extent the Federal Power Commission is permitted under such new interpretation of the Natural Gas Act to use its rate making power, not only to protect consumers against exploitation at the hands of natural gas companies, but also as a tool to protect the correlative rights of landowners and producers, and as a tool to conserve this nation's rapidly vanishing natural gas supplies.

We respectfully paraphrase the language of Mr. Justice Jackson, commenting upon another *per curiam* decision:[5]

> "The Court's one-sentence decision reverses concurring judgments of two highly respected courts—the Supreme Court of Kansas, and the District Court of Finney County, Kansas. It cites two cases, the im-

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[4] This Court has already permitted *Hope* to be construed as a ban on the use of federal rate regulation as a conservation tool. See *City of Detroit* v. *Federal Power Commission*, 230 F. 2d 810, cert. den. 352 U.S. 829.

[5] *Brownell* v. *Singer*, 347 U.S. 403 (1954), dissenting opinion:

> "The Court's one-word decision reverses concurring judgments of three highly respected courts—the Court of Appeals of New York, the Appellate Division of the Supreme Court, First Department, and the Supreme Court, Special Term, New York County. It cites a single case, the implication being that the cited authority settled the question so fully and plainly that a contrary result could have been reached by the three lower courts only by failure to read or heed it. I think this Court owes those courts and the legal profession something more than a reference to an inapplicable decision. The facts of this case present novel questions that this Court should face and on which it should render a reasoned decision."

plication being that the cited authorities settled the question so fully and plainly that a contrary result could have been reached by the two lower courts only by failure to read or heed them. We think this Court owes these Courts and the legal profession something more than a reference to two decisions both of which are readily distinguishable on the facts and neither of which presented issues here present. The facts in this case present novel questions that this Court should face and on which it should render a reasoned decision."

Assuming that the Kansas order is nothing less than an attempt to fix a minimum price to be paid for gas at the wellhead, and as such is thought to be inconsistent with *wellhead* rate regulation by the Federal Power Commission, the issue is whether this court should depart from the doctrine of *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 690, quoted above, resolving such conflict in favor of the states where the sales, though technically in interstate commerce, are made *during the course of production or gathering* and ~~one~~ are so closely connected with the local incidents of that process as to make regulation thereof necessary to conserve gas and protect correlative rights. Neither *Phillips* nor *Panoma* resolves this conflict, foreseen in *Interstate*, in favor of federal power. Neither overrules the test provided by *Interstate*. If the *Interstate* test is applied, the judgment below must be affirmed. If the *Interstate* test is not to apply, some other test must be supplied in its stead. Some such alternative, but unannounced, test had to be used in the case at bar.

Prior to the decision in the case at bar, the test of state power was simply this—Could the state have done this prior to 1938?

Prior to the decision in the case at bar, the test of federal power to regulate sales was furnished by *Interstate*—Are the sales (a) *made during the course of production and*

gathering, and are they (b) *so closely connected with the local incidents of that process as to render federal regulation inconsistent or a substantial interference with the exercise by the state of its regulatory functions?*

The only suggested substitute for these two tests which were urged by the prevailing parties here was the suggestion by the Solicitor General (brief, p. 31) that any state order which has a "direct and substantial effect upon sales of natural gas in interstate commerce" is barred. Such a test puts in jeopardy many of the regulatory activities of many states, including proration and ratable take requirements, as well as severance taxes, since all such activities and taxes have a very direct and substantial effect upon sales and on costs and on prices of gas in interstate commerce.

Such a test is contrary to all the previous decisions of this Court and the Solicitor General's pious oral promise that "proper" measures of conservation will pass the test is no substitute for a decision announcing a new test and announcing how it is to be applied. Here we have a measure admittedly necessary and required in the interest of conservation and protection of correlative rights, yet stricken, under the only test suggested, because not "proper" since it "affected" price.

The Solicitor General presumed to speak for "poor consumers" and joined in this effort of pipeline monopolists to restore the gross inequities imposed upon a multitude of helpless farmers and captive suppliers, with resultant prodigal exploitation of a rapidly-vanishing, premium, special advantage, flush-production fuel as though it were a virtually valueless distress commodity almost as abundant as the Kansas air. What relief can Kansas expect for its citizens and what conservation actions can the nation expect from Washington when a responsible federal official, speaking

for the only federal agency concerned, is interested only in the fastest possible exploitation for the lowest and least efficient uses at the cheapest possible price to present-generation voters in the national electorate?

Before 1938, state action fixing the price of a commodity immediately shipped in interstate commerce and levying a severance tax thereon based on such fixed price, *strictly as a conservation measure*, did not violate the Commerce Clause.[6] This court has repeatedly construed the Natural Gas Act as not impairing state powers existing in the pre-1938 era.[7] We submit that if this court were to require itself again to examine, for written opinion herein, *Phillips* and *Panoma*, in the light of the pre-1938 cases and in the light of such post-1938 decisions construing the Natural Gas Act, that it would find that this record presents issues, above described, not present in *Phillips* and *Panoma*, which require that the judgment below be affirmed.

Wherefore, petitioners respectfully pray that this court vacate the judgment and decision heretofore entered on

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[6] *Lacoste* v. *Department of Conservation*, (1924) 263 U.S. 545, where the state action challenged fixed "purchase prices" of covered skins and hides (263 U.S. at 552), which were immediately shipped in interstate commerce (263 U.S. at 551) and assessed a severance tax thereon, based on such fixed value, as "an exertion of the *police power* of the state *to conserve* and protect wild life." (263 U.S. at 550). The state action was found not to violate the Commerce Clause.

[7] *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 506-508; *Public Utilities Co.* v. *United Fuel Gas Co.*, 317 U.S. 456, 467; *Federal Power Com.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 609, 610; *Colorado Interstate Gas Co.* v. *Federal Power Com.*, 324 U.S. 581, 599, 600; *Interstate Natural Gas Co.* v. *Federal Power Com.*, 331 U.S. 682, 689-693; *Panhandle Eastern Pipe Line Co.* v. *Public Service Com.*, 332 U.S. 507, 514-521; *Federal Power Com.* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-504; *Federal Power Com.* v. *East Ohio Gas Co.*, 338 U.S. 464, 472, 473.

January 20, 1958, and grant rehearing herein and, upon rehearing, enter its judgment and decision affirming the judgment below.

Respectfully submitted,

CLYDE MILLIGAN, General Counsel,
State Corporation Commission of Kansas,
State Office Building,
Topeka, Kansas,
FRANK G. THEIS, Special Counsel,
301 A. C. Office Building,
Arkansas City, Kansas,
WAYNE COULSON, Counsel,
*DALE M. STUCKY, Counsel,
901 First National Bank Building,
Wichita, Kansas,
Attorneys for Appellees.

*Attorney upon whom service is to be made.

CERTIFICATE OF COUNSEL.

The undersigned, one of counsel for appellees, hereby certifies that the above and foregoing petition for rehearing is presented in good faith and not for delay.

.....,

DALE M. STUCKY.